

1 Hon. Charles A. Legge (Ret.)  
2 JAMS  
3 Two Embarcadero Center, Suite 1500  
4 San Francisco, CA 94111  
5 Telephone: (415) 982-5267  
6 Fax: (415) 982-5287  
7 Special Master

JAMS

9 IN RE: CATHODE RAY TUBE (CRT)  
10 ANTITRUST LITIGATION

11 CRAGO, INC., et al.,

12 Plaintiffs,

13 vs.

14 CHUNGHWA PICTURE TUBES, LTD., et al.,

15 Defendants.  
16  
17

18 This Document Relates to All Cases  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**No. 07-5944 SC**

**MDL No. 1917**

**JAMS Reference No. 1100054618**

**REPORT, RECOMMENDATIONS  
AND TENTATIVE RULINGS  
REGARDING DEFENDANTS'  
MOTIONS TO DISMISS**

*Table of Contents*

PROCEDURE	2
GENERAL ORGANIZATION OF THIS REPORT	3
THE RELEVANT PRODUCTS	3
PLEADING A CONSPIRACY	7
A. Legal Standard	7
B. The Direct and Indirect Complaints	9
ALLEGATIONS AGAINST SEPARATE DEFENDANTS	11
A. Legal Standard	11
B. The Indirect Purchaser Complaint	13
C. The Direct Purchaser Complaint	15
THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT	16
ANTITRUST STANDING	18
STATUTES OF LIMITATION	19
A. Legal Standard	19
B. The Direct Case	22
C. The Indirect Case	22
WITHDRAWAL	24
STATE LAW CLAIMS IN THE INDIRECT CASE	27
Nebraska	28
Nevada	29
Hawaii	29, 31
Massachusetts	29
New York	30, 32
Rhode Island	30
Michigan	31
Kansas	31
SUMMARY OF RECOMMENDATIONS	33
Appendix A	35
Appendix B	36

Hon. Charles A. Legge (Ret.)  
JAMS  
Two Embarcadero Center, Suite 1500  
San Francisco, CA 94111  
Telephone: (415) 982-5267  
Fax: (415) 982-5287  
Special Master

JAMS

IN RE: CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION

CRAGO, INC., et al.,

Plaintiffs,

vs.

CHUNGHWA PICTURE TUBES, LTD., et al.,

Defendants.

**No. 07-5944 SC**

**MDL No. 1917**

**JAMS Reference No. 1100054618**

**REPORT, RECOMMENDATIONS  
AND TENTATIVE RULINGS  
REGARDING DEFENDANTS'  
MOTIONS TO DISMISS**

This Document Relates to All Cases

To the Honorable Samuel Conti, United States District Judge:

The undersigned Special Master submits this report, recommendations and tentative rulings on the motions to dismiss which have been filed by the defendants in both the direct purchaser case and the indirect purchaser case.

The jurisdiction to make recommendations with respect to these motions has been vested in the undersigned by orders issued by the Court on June 16, 2008 and April 8, 2009. More

specifically, the order of April 8 2009 provides that, “all motions that will be filed in this litigation are referred to Judge Legge who will issue recommendations and tentative rulings on the motion.”

#### PROCEDURE

Consolidated amended complaints were filed in both the direct and indirect actions on March 16, 2009. The words “complaint” or “complaints” in this report refer to those consolidated amended complaints.

Defendants have filed motions to dismiss both complaints. In each case there is a joint motion filed by substantially all of the defendants, and some separate motions by defendants who raise matters individual to them. The moving defendants in the direct action are listed in appendix A, taken from the proposed form of order submitted by defendants. The moving defendants in the indirect action are listed in appendix B, taken from defendants’ proposed form of order. The names in the two appendices do not include defendants who have subsequently been dismissed or have other arrangements for their motions.

Plaintiffs filed oppositions to all of the motions, and defendants then filed closing briefs. The briefs and supporting papers on the motions are, to say the least, extensive.<sup>1</sup>

The motions were heard together on October 5, 2009. The arguments were recorded by a court reporter. At the end of the hearings, the motions were submitted for decision. Some later authorities and supporting papers were filed by some of the parties.

---

<sup>1</sup> The two amended complaints total 140 pages, and the briefs total almost 700 pages.

1 It was stipulated by the parties that (together with subsequently granted continuances) the  
2 date for the completion of this report, recommendations and tentative rulings is February 8,  
3 2010.

#### 4 GENERAL ORGANIZATION OF THIS REPORT

5 The sections of this report are the issues raised by the moving defendants, although not  
6 necessarily in the order raised by them. In each section, where possible this report will discuss  
7 both the direct purchaser complaint and the indirect purchaser complaint, because many of the  
8 issues are common to both. Where appropriate, the report will cite to the paragraphs of the  
9 respective consolidated amended complaints ("DC" and "IC"). In each section, the issues raised  
10 in the joint motion will usually be considered first, and the separate issues as appropriate.  
11

12 Because of the volume of the complaints and briefs, this report must combine and  
13 synthesize the contentions, without mentioning every party's arguments and authorities; but  
14 hopefully without omitting any material points.  
15

16 The recommendation as to each issue will be stated at the end of the section on that issue.  
17 The recommendations will all be restated in the last section of the report.  
18

#### 19 THE RELEVANT PRODUCTS

20 Defendants contend that both complaints allege a conspiracy only as to CRTs, and not as  
21 to the products into which the CRTs are assembled and sold through the chain of distribution.  
22 Identifying which products are the subject of the alleged conspiracy underlies the analysis of  
23 many of the grounds for defendants' motions; e.g. adequacy of pleading, jurisdiction, standing,  
24 Illinois Brick, statutes of limitation, application of state laws, and certain of the allegations  
25 against each defendant.  
26  
27  
28

1 It is apparent that the CRTs are manufactured abroad and are sold to foreign other-  
2 equipment manufacturers, which incorporate the CRTs into their products, such as computers  
3 and television sets. And it is the assembled products containing the CRTs which are then sold  
4 into the United States through the chain of distribution, and are ultimately sold and purchased in  
5 retail markets of the United States. Apart from the CRTs being contained in the assembled  
6 products, there is apparently no separate market for CRTs in the United States.

7  
8 Plaintiffs have the right to control their own complaints, and they are free to allege  
9 whatever products they can ultimately prove have been the subject of a price fixing conspiracy.  
10 And it is apparent from the face of both complaints that plaintiffs are attempting to allege a  
11 conspiracy as to both the CRTs themselves (“CRTs”) and the products into which they are  
12 incorporated (“CRT Products”). Both complaints are replete with allegations regarding both  
13 product lines. And the complaints repeatedly make allegations regarding both products in the  
14 same paragraphs. For example:

15  
16 The two products, “CRTs” and “CRT Products” (and some subsets thereof) are  
17 specifically identified and discussed in the very first paragraph of the DC. In identifying price  
18 fixing activities, CRT Products are expressly mentioned in paragraphs 4, 5 and 6 of the DC. In  
19 paragraphs 11 through 23 of the DC, plaintiffs identify their purchases from defendants as being  
20 purchases of CRT Products. And in their allegations of the manufacture, distribution and sale by  
21 each defendant or group of defendants, DC paragraphs 24 through 80, CRT Products are  
22 expressly discussed. The class allegations of the DC, paragraphs 85 through 92 encompass CRT  
23 Products. The trade and commerce allegations in paragraphs 96 and 97 of the DC refer to CRT  
24 products.  
25  
26  
27  
28

1 In the conspiracy allegations, in the section “Collusive Contracts, Meetings, and  
2 Agreements Among Members of the CRT Products Industry,” the DC in paragraphs 134 through  
3 153 include CRT Products. For example, paragraph 138 of the DC alleges agreements and  
4 activities among the defendants “With respect to CRT Products....”

5 The allegations of the indirect complaint are parallel to the direct complaint. The IC  
6 identifies “CRT Products” as being a subject matter of the antitrust allegations; paragraphs 1, 2  
7 and 3. CRT Products are expressly referred to in the allegations of: the effects on commerce  
8 (paragraphs 10 through 12); the definitions of the products (paragraphs 14 and 15); plaintiffs’  
9 purchases (paragraphs 19 through 49); and defendants’ manufacturing, distribution and sale  
10 directly or indirectly in the United States (paragraphs 50 through 107). More specifically,  
11 paragraphs 140 through 188 state that allegedly illegal agreements were entered into by the  
12 defendants with respect to CRT Products. The alleged Sherman Act violations expressly refer to  
13 the CRT Products (paragraphs 244 through 251). And the allegations of state law violations also  
14 include CRT Products (paragraph 255 through 283).

15 There can be no doubt from the multiple allegations stating “CRT Products” that those  
16 products, and not just the CRTs alone, are the products alleged by plaintiffs to be subject to the  
17 conspiracy charged in both complaints.

18 Defendants nevertheless argue that the complaints allege only anti-competitive  
19 agreements concerning CRTs (defendants’ joint motions to dismiss the direct action, page 6, and  
20 the indirect action, page 1). That distinction underlies most of defendants’ grounds for dismissal  
21 in these motions. That is, the success of their argued grounds depend upon defendants’  
22 establishing their contention that the complaints allege only “CRTs” and not “CRT Products.”  
23  
24  
25  
26  
27  
28

1 However, defendants' "CRTs only" distinction is contrary to the repetitive allegations of  
2 defendants' conduct regarding "CRT Products," and to their distribution, purchase and sale in the  
3 United States. Defendants attempt to construe plaintiffs' complaints as alleging only an effect on  
4 the prices of the finished products in the United States. But that contention ignores the repeated  
5 allegations in the complaints regarding "CRT Products" being a subject of the conspiracy.

6  
7 Defendants even say that paragraph 138 of the direct complaint alleges only a "CRTs (not  
8 Finished Products)" conspiracy; page 4 lines 5-7 of the direct motion. But that ignores that  
9 paragraph 138 expressly begins with the words: "With respect to CRT Products...." Having  
10 reviewed the complaints paragraph by paragraph, the Special Master disagrees with defendants'  
11 argument that plaintiffs allege only a conspiracy regarding prices "at which CRTs (not 'Finished  
12 Products') were sold..." That is an incorrect reading of the obviously intended scope of the  
13 complaints.  
14

15 Defendant's cite to some paragraphs of the complaints that do not expressly say "CRT  
16 Products;" e.g. paragraphs 145 through 154 of the DC and paragraphs 152 through 155 of the IC.  
17 However, not every paragraph of such lengthy complaints need repeat the same words. The  
18 complaints must be viewed as a whole. And the paragraphs immediately preceding and following  
19 those paragraphs do expressly say "CRT Products."  
20

21 There is no doubt to this Special Master that both complaints on their face attempt to and  
22 do allege a conspiracy to fix the prices of CRT Products, as well as CRTs themselves. And, there  
23 is nothing legally wrong with plaintiffs defining their product market in that way.  
24

25 The Special Master recommends that the Court find that the complaints allege a  
26 conspiracy involving CRT Products as well as CRTs.  
27  
28



1 The Special Master believes that what defendants are really contending is not just that  
2 CRT Products are not alleged to be a subject of the conspiracy, but rather that plaintiffs have not  
3 adequately alleged such a conspiracy under the pleading standards discussed below. The Special  
4 Master will now turn to those grounds for defendants' motions to dismiss.

#### 5 PLEADING A CONSPIRACY

6 Defendants contest the sufficiency of plaintiffs' allegations of conspiracy under the  
7 recent United States Supreme Court decisions of Bell Atlantic vs. Twombly 550 U.S. 544  
8 (2007), and Ashcroft vs. Iqbal, 129 S. Ct. 1937 (2009).

##### 9 A. Legal Standard

10 The standard for that requirement, and hence for this court's inquiry, is Rule 8 of the  
11 Federal Rules of Civil Procedure; that is, giving fair notice to the defendants of what the claim  
12 against them is and the grounds upon which it rests; Twombly p. 555; Iqbal p. 1949; see also  
13 Erickson v. Pardus, 551 U.S. 89 (2007).

14 The Supreme Court in Iqbal summarized the decision and conclusions to be drawn from  
15 Twombly:

16 "To survive a motion to dismiss, a complaint must contain sufficient  
17 factual matter, accepted as true, to 'state a claim to relief that is plausible at its  
18 face.' A claim has facial plausibility when the plaintiff pleads factual content that  
19 allows the court to draw the reasonable inference that the defendant is liable for  
20 the misconduct alleged." Pg. 1949.

21 The Court also stated that pleading legal conclusions is not enough, but rather they must  
22 be supported by factual allegations:  
23  
24  
25  
26  
27  
28

1 “When there are well pleaded factual allegations, a court should assume  
2 their veracity and then determine whether they plausibly give rise to an  
3 entitlement to relief.” Pg. 1950.

4  
5 Research has not disclosed any relevant Ninth Circuit cases interpreting those Supreme  
6 Court decisions in antitrust conspiracy litigation. However, there have been numerous decisions  
7 of this district doing so: TFT-LCD (Flat Panel) Antitrust Litigation (Judge Ilston), 586 F. Supp.  
8 2d 1109 (2008) (“TFT-LCD I”), and 599 F. Supp. 2d 1179 (2009) (“TFT-LCD II”); Static  
9 Random Access Memory (SRAM) Antitrust Litigation (Judge Wilken), 580 F. Supp. 2d 896  
10 (2008); Rubber Chemicals Antitrust Litigation (Judge Jenkins), 504 F. Supp. 2d 777 (2007);  
11 Flash Memory Antitrust Litigation (Judge Armstrong), 643 F. Supp. 2d 1133 (2009); and  
12 Graphic Processing Units Antitrust Litigation (Judge Alsop), 527 F. Supp. 2d 1011 (2007)  
13 (“GPU<sub>I</sub>”), and 540 F. Supp. 2d 1085 (2009) (“GPU<sub>II</sub>”).

14  
15 The Rubber Chemicals case cited the Twombly standard that the face of the complaint  
16 must sufficiently allege facts that “suggest a right to relief that is more than merely conceivable,  
17 but plausible on its face;” p. 780. The decision in TFT-LCD I, a year after Rubber Chemicals,  
18 contains a more elaborate discussion of the Twombly requirements. The court again found the  
19 standard to be based upon FRCP Rule 8 (pp. 1114-1115). The court held that the plaintiffs’  
20 complaint was adequate, citing the following allegations from the complaint: Complex and  
21 unusual pricing practices by the defendants, not explained by the forces of supply and demand; a  
22 pre-conspiracy market of declining prices because of advances in technology and efficiencies;  
23 new companies entering the market, resulting in increased competition; unnatural and sustained  
24 price stability; certain periods of substantial increase of prices; compression of price ranges; and  
25  
26  
27  
28

1 manipulation of production capacity; pp 1115-16. The court said that “allegations of such  
2 unusual pricing practices state a cause of action under Twombly.” p 1116. Similar allegations are  
3 part of the DC and IC.

4 The decision in SRAM is consistent. The court there noted the allegations that SRAM  
5 products were susceptible to price fixing because of various market factors (page 899), as does  
6 the DC and the IC. And the court considered the Department of Justice’s actions against the  
7 defendants, even in other litigation, as being relevant to an inference of the conspiracy alleged in  
8 the challenged complaint (page 903). The court also grounded its decision on FRCP Rule 8, and  
9 stated that the rule does “not require a claimant to set out in detail the facts upon which it bases  
10 its claims” (page 900). That complaint, as do the DC and IC, included a number of allegations of  
11 actual meetings and communications. The court concluded that the plaintiffs had pled sufficient  
12 facts to plausibly suggest a price fixing conspiracy.  
13

14  
15 B. The Direct and Indirect Complaints

16 The cited decisions in this district, all of which ultimately upheld complaints under  
17 Twombly, support the adequacy of the two complaints at issue here. The present complaints are  
18 not, as Twombly was, just an allegation of parallel business conduct where the inquiry was to  
19 see if there was additional evidence to support the charge that the parallel conduct was the result  
20 of an agreement. Here we have extensive allegations of meetings, communications, and  
21 agreements to fix prices and production levels. Those allegations ultimately have to be proved,  
22 but for pleading purposes such communications, meetings and agreements are certainly alleged.  
23

24 In the DC, there are also allegations of governmental antitrust investigations and pleas  
25 (paragraphs 124-133), of specific meetings, conversations and participants, of the exchanging of  
26 pricing information, of the giving of price quotations in accordance with agreements reached,  
27  
28

1 and of taking steps to conceal the conspiracy through various means. More precise factual  
2 allegations of the contacts, meetings and agreements are set forth in paragraphs 134-153. While  
3 the Special Master has not yet addressed the arguments by certain defendants that they are not  
4 specifically connected to the allegations (see next section), paragraphs 134-153 contain factual  
5 allegations of the conduct of the conspiracy. These allegations are not merely suggestive of a  
6 conspiracy, but rather they directly charge one. Defendants can hardly say that they do not have  
7 notice, under the Rule 8 standard, of what is being charged against them.  
8

9 Similarly in the indirect complaint, plaintiffs have alleged the structure of the CRT  
10 product market and its susceptibility to price fixing arrangements (paragraphs 121 through 139).  
11 The complaint also alleges specific agreements and actions by the defendants to fix prices and  
12 production levels, (paragraphs 140 through 188). Those allegations need not be quoted in detail.  
13 Suffice it to say that they allege meetings, locations, dates, types of meetings, specific  
14 agreements reached at the meetings, and the participation of specific defendants. For example,  
15 paragraphs 166 through 168 allege dates, companies, and some persons present and participating  
16 in the conspiracy. The complaint alleges unusual price movements which are contrary to  
17 principles of supply and demand (paragraphs 192 though 202). Governmental antitrust  
18 investigations are also cited (paragraphs 203 through 221).  
19

20  
21 The Special Master finds and concludes that both the direct and the indirect complaints  
22 make allegations which meet the requirements of Twombly and Iqbal, and also follow the guide  
23 of the other courts in this district which have reviewed similar allegations. There are allegations  
24 of specific facts, and not just labels or generalities. And the alleged facts, if true, certainly lead to  
25 a plausible claim of antitrust violations under section 1 of the Sherman Act. And the allegations  
26  
27  
28

1 comply with the requirements of Rule 8 that defendants be given adequate notice of the charges  
2 against them.

3 The Special Master recommends that the Court deny defendants' motions to dismiss  
4 based on Twombly and Iqbal.

#### 5 6 ALLEGATIONS AGAINST SEPARATE DEFENDANTS

7  
8 The Special Master now turns to the question of whether there are adequate  
9 allegations against the separate defendants asserting that each is a participant in the conspiracy,  
10 and that the requirements of Rule 8 are satisfied.

11 Defendants assert in their joint motions, and in several of their separate motions, that the  
12 DC and IC do not sufficiently allege the participation of each defendant in the conspiracy.

#### 13 14 A. Legal Standard

15 The requirement of separate pleading against each defendant in an alleged antitrust  
16 conspiracy does not find its genesis in Twombly. Twombly does not define such a requirement,  
17 but addresses the sufficiency of conspiracy allegations generally. Nor does Iqbal expressly state  
18 such a requirement.

19  
20 However, other cases, including several in this district, have discussed the need for  
21 individual allegations in antitrust conspiracy cases. In TFT-LCD I, the court granted motions to  
22 dismiss as to certain defendants because the first complaint was insufficient to put them on  
23 notice of the claims. Again, the genesis of that principle is Rule 8's requirement of adequate  
24 notice. The court agreed with plaintiffs that a complaint need not contain detailed "defendant by  
25 defendant" allegations and "need not plead each defendant's involvement in the alleged  
26 conspiracy in elaborate detail" (pages 1116-17). The court defined the obligation as including  
27  
28

1 charges alleging each defendant's role in the alleged conspiracy (page 1117). The court granted  
2 leave to amend, and the amended complaints came back before the court in TFT-LCD II. The  
3 court then found that the amended complaints sufficiently alleged anti-competitive conduct  
4 (page 1184). The court emphasized that neither Twombly nor the court's prior order required  
5 "elaborate fact pleading." And the amended complaint added sufficient facts about illicit  
6 conspiratorial communications among the defendants. The complaint also alleged guilty pleas  
7 entered by four defendants. The court noted that the amended complaints contained additional  
8 specific information about the meetings by which the alleged price fixing conspiracy was  
9 accomplished. And there were allegations about bilateral discussions and various types of  
10 meetings. Even if complaints do not differentiate among related corporate entities, if a  
11 conspiracy is allegedly organized at the highest level of the defendant organization and is carried  
12 out by subordinates, that is sufficient (pp 1184 - 1185).

15 In SRAM, this district also upheld the sufficiency of conspiracy allegations against the  
16 defendants' arguments that plaintiffs had to allege how each individual defendant participated  
17 (page 904). The court commented that such a requirement is more consistent with the standard  
18 for a motion for summary judgment than a motion to dismiss; id. The court said that plaintiffs at  
19 the pleading stage need only "make allegations that plausibly suggest that each Defendant  
20 participated in the alleged conspiracy." (Id.) (emphasis added).

22 In Brennan vs. Concord EFS Inc., 369 F Supp 2d 1127 (2005) Judge Walker dismissed a  
23 complaint against two alleged conspiracy defendants because the complaint did not contain  
24 allegations connecting them to the conspiracy. The reasoning was that the complaint "does not  
25 give fair notice under FRCP 8" to the defendants or to the court of the role that they are alleged  
26 to have played in the conspiracy (page 1137).  
27  
28

1 The Special Master concludes from the cases in this district that “each defendant”  
 2 pleading is not a rule requiring detailed recitation, but is to be evaluated under the principle of  
 3 the adequacy of fair notice to the defendants. With that as the guide, it is of course possible that a  
 4 complaint, even if lacking repetitive allegations naming each defendant, might as a whole supply  
 5 the requisite notice. It is also plausible for pleading purposes that where an allegation is made  
 6 that the parent corporation of a corporate family was a participant in a conspiracy, that the  
 7 subsidiaries followed the directions of the parent. And in this circuit an allegation of corporate  
 8 agency and control may be enough; Weinstein vs. Saturn, 303 Fed. Appx. 424 (9<sup>th</sup> Cir 2008).  
 9 The context is the entire complaint. As stated by the U.S. Supreme Court, “The character and  
 10 effect of a Sherman Act conspiracy are not to be judged by dismembering it and viewing its  
 11 separate parts, but only by looking at it as a whole.” Continental Ore, v. Union Carbide 370 US  
 12 690 (1962) at 698-99.  
 13  
 14

#### 15 16 B. The Indirect Purchaser Complaint

17 In the indirect action, the defendants who are separately moving to dismiss are listed on  
 18 page 1 of plaintiffs’ opposition brief. They are here identified by their corporate groups:  
 19 Panasonic, Samsung, Hitachi, LG, Phillips, Toshiba, and BMCC.  
 20

21 The Special Master notes some of the paragraphs of the IC allegations:

22 164: Defendants Hitachi, Toshiba, Panasonic and others attended certain meetings and  
 23 met bilaterally with other defendants for the purpose of communicating pricing or output  
 24 agreements. 165: Samsung had a relationship with Hitachi and communicated CRT Product  
 25 pricing agreements to Hitachi. LG had a relationship with Toshiba and communicated CRT  
 26 Product agreements to Toshiba. Hitachi, Toshiba and Samtel implemented the agreed upon  
 27  
 28



1 pricing as conveyed to them, and they sometimes attended the meetings. 166: Samsung (through  
2 its member companies) participated in at least 200 meetings. Some of these were attended by the  
3 highest ranking executives of Samsung. 168: LG participated in at least 100 meetings at all  
4 levels. After 2001, it participated in the conspiracy through its joint venture with Phillips. Some  
5 of these meetings were attended by the highest ranking executives of LG. 170: Defendant  
6 Phillips (through its related companies) participated in at least 100 glass meetings at all levels.  
7 Some of the meetings were attended by high level executives. Toshiba participated in several of  
8 the meetings and after 2003 participated through its joint venture with Panasonic. Toshiba also  
9 engaged in multiple bilateral discussions with other defendants, particularly LG. 178: Other  
10 Toshiba entities were represented at the meetings. 179: Hitachi (through its other entities)  
11 participated in several meetings, attended by high level sales managers from Hitachi. And  
12 Hitachi also engaged in bilateral discussions with other defendants, particularly Samsung. 181:  
13 Panasonic Corporation and Matsushita participated in meetings and in bilateral discussions, and  
14 after 2003 through a joint venture with Toshiba.

15 Those allegations should also be considered together with the specific allegations  
16 identifying the defendant entities in paragraphs 50 through 109.

17 The Special Master concludes that each of the moving defendants has more than  
18 adequate notice of what that defendant is charged with. Even though each member of a  
19 corporate family may not have its name and acts recited in the complaint, for pleading purposes  
20 each defendant has notice of the products, time frames, meetings, subject matters, other  
21 participants, locations, and alleged conduct. And each is able to question its personnel and search  
22 its records for available information based upon the allegations of the complaint. This is  
23 sufficient to serve the principle of Rule 8. If any defendant claims that it was not a member of the  
24  
25  
26  
27  
28



1 conspiracy, it can do so by a denial, and then after some factual development make an  
2 appropriate motion.

3  
4 C. The Direct Purchaser Complaint

5 In the direct action, the defendants who have filed separate motions to dismiss are  
6 identified in footnote 15 on pages 28 and 29 of their joint motion.<sup>2</sup> They are here identified by  
7 their company groups: Panasonic, LG, BMCC, Samtel, Hitachi, Toshiba and Samsung.

8  
9 Plaintiffs' opposition brief directly responds to the adequacy of the allegations against  
10 each defendant or defendant group on pages 45 through 117. Plaintiffs identify the allegations by  
11 the specific paragraphs of the complaint. The Special Master believes that plaintiffs have made  
12 the necessary showing, and that each allegation as to each defendant need not be repeated in this  
13 report.  
14

15 Some of the motions are also answered by the rulings recommended above: that the  
16 complaint alleges a conspiracy as to CRT Products as well as to CRTs; that the conspiracy  
17 allegations are sufficient under Twombly; and that the alleged facts reasonably infer a plausible  
18 price fixing conspiracy.  
19

20 Defendants' arguments about not stating a claim against each defendant puts form over  
21 substance. That is, defendants would apparently be satisfied only with a complaint that made  
22 separate allegations against each defendant, and in each allegation repeated all of the necessary  
23 facts which plaintiffs must prove. But the principle underlying the pleading requirement is not  
24 formalistic exposition. Rather, as has been cited several times above, it is Rule 8's requirement  
25  
26

27  
28 

---

<sup>2</sup> The motions do not argue just Twombly, but also the requirement to charge each defendant.

1 of giving a defendant fair notice as to what it is being charged with, so that it can prepare to  
2 defend itself. The key is notice, not articulation.

3 One cannot read the DC without concluding that each defendant, or at least each  
4 defendant group and many of the individual companies within each group, has adequate  
5 knowledge that it is being charged with: fixing prices, during a certain time period, of certain  
6 products, by virtue of meetings which it allegedly attended, and by communications in which it  
7 allegedly participated, and by agreements it allegedly made with other defendants (many of  
8 whom are specifically named). There is certainly adequate information for each defendant to  
9 examine its personnel, and to search its documents and databases. And each defendant would  
10 then know enough to be able to plead, to assert a denial, to allege affirmative defenses, and to  
11 prepare for motions if appropriate.  
12

13  
14 The purpose of the “each defendant” requirement has been satisfied. If some defendants,  
15 whether they are individual defendants, defendant groups, or individual defendants within a  
16 group, conclude that they did not participate in the charged activities, they are free to assert that  
17 defense and put plaintiffs to their burden of proof.  
18

19 The Special Master therefore recommends that the Court deny the defendants’ motions to  
20 dismiss based upon an argued failure to adequately plead against “each defendant.”

#### 21 THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

22 Defendants move to dismiss both cases on the ground that there is no jurisdiction under  
23 the Sherman Act. The defendants’ argument is that United States laws cannot apply to a wholly  
24 foreign conspiracy. That argument is based upon 15 U.S.C. Section 6a, The Foreign Trade  
25 Antitrust Improvements Act. That section provides that the Sherman Act shall not apply to  
26 “conduct involving trade or commerce (other than import trade or import commerce) with  
27  
28

1 foreign nations unless... (1) such conduct has a direct, substantial and reasonably foreseeable  
2 effect” on (A) [U.S. commerce]. By that section, Congress sought to deprive the federal courts of  
3 jurisdiction over purely foreign activity that would otherwise violate the Sherman Act.

4 The section is somewhat awkward in its language. It initially creates a general rule  
5 placing activity involving foreign commerce outside of the reach of the Sherman Act. However,  
6 it specifically excludes from that prohibition “import trade or import commerce.” And it then  
7 permits Sherman Act jurisdiction over foreign commerce where the conduct “has a direct,  
8 substantial and reasonably foreseeable effect” on domestic commerce, and if the conduct gives  
9 rise to an antitrust claim. See Hoffmann-LaRoche vs. Empagran, 542 U.S. 155 (2004). The  
10 underlying principle is that the U.S. antitrust laws are for the regulation of American commerce,  
11 including American sellers and consumers, and not for the regulation of wholly foreign  
12 commerce.  
13  
14

15 In an attempt to apply that statute to these cases, defendants again return to one of their  
16 principal arguments discussed above; that is, that the alleged conspiracy encompasses only CRTs  
17 (which were manufactured and sold only among foreign companies), rather than encompassing  
18 CRT Products, which were imported into the United States and sold extensively here. But as  
19 stated in the discussion of that issue above, these two complaints do allege antitrust violations  
20 regarding CRT Products as well as CRTs themselves. And the complaints do allege that CRT  
21 Products manufactured by the defendants were imported into the United States, and bought and  
22 sold in United States trade and commerce, to American distributors and consumers at allegedly  
23 artificial prices.  
24  
25

26 Both complaints allege claims for purchases of CRT Products in the United States, at  
27 prices artificially inflated by defendants, and with an impact on United States prices for those  
28

1 products. And the alleged classes are limited to entities that purchased CRT Products in the  
2 United States. And indeed, the complaints contain numerous allegations about conduct in the  
3 United States facilitating the conspiracy. These are not cases of foreign plaintiffs attempting to  
4 use United States courts and United States antitrust laws to seek redress for injuries brought  
5 about by foreign commerce.

6  
7 The Special Master therefore recommends that the Court deny the defendants' motions to  
8 dismiss based upon the FTAIA. And as a result of plaintiffs' compliance with the FTAIA, the  
9 alleged claims are not barred by the Supremacy Clause or the Commerce Clause of the United  
10 States Constitution; see fn. 6 on p. 13 of the motion to dismiss the IC.

#### 11 ANTITRUST STANDING

12  
13 Defendants also move to dismiss based upon an argument of plaintiffs' supposed lack of  
14 standing under Associated General Contractors of California vs. California State Council of  
15 Carpenters, 459 U.S. 519 (1983), and Illinois Brick Co. vs. Illinois, 431 (1977). However, that  
16 argument is based in turn upon defendants' perception that the complaints allege a price fixing  
17 conspiracy only as the CRTs. And, the Special Master interprets the complaints as alleging a  
18 conspiracy as to CRT Products as well.

19  
20 Both complaints allege that plaintiffs have purchased CRT Products from the defendants.  
21 The allegation is that because the prices at which they purchased the products were inflated by  
22 the alleged conspiracy, plaintiffs have suffered antitrust injuries and their claimed injuries are not  
23 remote under A.G.C. And because the plaintiffs in the direct case purchased CRT Products from  
24 the defendants, they are not indirect purchasers under Illinois Brick. The plaintiffs in the indirect  
25 case are admittedly indirect purchasers, and their complaint is written accordingly. They have  
26  
27  
28

1 alleged the elements of standing under A.G.C. And their standing under the state laws are  
2 measured by the scope of the states' "repealer" statutes.

3 In addition, plaintiffs have adequately pled standing to bring their injunctive claims under  
4 section 16 of the Clayton Act. The requirements for antitrust standing for section 16 relief are  
5 less restrictive than for section 4 standing. In re: Warfarin Sodium Antitrust Litigation, 214 F. 3d  
6 395 (3d Cir 2000).  
7

8 The Special Master therefore recommends that defendants' motion based upon the  
9 argument of plaintiffs' lack of standing be denied.  
10

#### 11 STATUTES OF LIMITATION

12  
13 Defendants move to dismiss on grounds of the statutes of limitation. The federal  
14 allegations in the two complaints are governed on this issue by the Clayton Act, and the state  
15 statutes of limitation are applicable to the state law claims in the indirect case.

##### 16 A. Legal Standard

17  
18 On the Sherman Act charges, the defendants move to dismiss plaintiffs' claims which  
19 accrued before November 26, 2003, unless they meet the requirements for the pleading of  
20 tolling.

21 It is clear that the Clayton Act bars claims for antitrust injuries based upon sales that  
22 occurred more than four years prior to the filing of the first complaint. In this case the first  
23 complaint was filed on November 26, 2007. Therefore, any claims accruing from sales prior to  
24 November 26, 2003, are time barred unless the statute is tolled. Apparently some defendants  
25 were not named until as recently as March 26, 2009, the date of the filing of the consolidated  
26 amended complaints. But the principle is the same. That is, claims from activities prior to four  
27  
28

1 years before the filing of the first complaint against such a defendant are barred, unless the  
2 statute is tolled.

3 There appears to be little or no dispute in these motions as to the federal statute of  
4 limitations or its operation. Nor is there any doubt that many of the allegations of the complaints  
5 charge activities prior to November 26, 2003. So the motions focus on whether there are  
6 adequate allegations of fraudulent concealment to toll the statute of limitations to a later date.  
7

8 The plaintiffs contend that their complaints adequately allege fraudulent concealment,  
9 which tolls the statute to the date on which plaintiffs discovered, or in the exercise of reasonable  
10 diligence should have discovered, defendants' illegal activities. Plaintiffs claim that date is  
11 November 26, 2007, when the United States' antitrust investigation of this industry first became  
12 public. The fraudulent concealment allegations are in paragraphs 200 through 212 of the direct  
13 purchaser complaint, and paragraphs 288 through 291 of the indirect complaint.  
14

15 As with other issues in these motions, we have the guidance of decisions of other courts  
16 in this district in substantially identical settings. TFT-LCD I, SRAM, Rubber Chemicals, and  
17 TFT-LCD II.  
18

19 In TFT-LCD I the court did an extensive analysis of the requirements for pleading  
20 tolling. As in this case, the defendants there asserted the statute of limitations, and the issue  
21 became the pleading of fraudulent concealment. The court cited Conmar Corporation vs. Mitsui  
22 & Company, 858 F. 2d 499 (9<sup>th</sup> Cir. 1988) as its guide, stating that a plaintiff alleging fraudulent  
23 concealment must plead with particularity "the circumstances of the concealment and the facts  
24 supporting [the plaintiff's] due diligence" (p. 1119). The court also cited Rubber Chemicals that  
25 fraudulent concealment is fact-intensive and is generally inappropriate to resolve such issues on  
26 a motion to dismiss (p. 1120).  
27  
28

1 The district court reviewed the allegations of the TFT-LCD complaints, which were  
2 similar to those in this case, and stated that both the direct and indirect complaints adequately  
3 alleged acts of concealment, including offering pretextual reasons for the price fixing meetings  
4 and price increases (pages 1119-1120 and 1132). See also, SRAM.

5 Defendants' motions emphasizes that plaintiffs have not alleged fraudulent concealment  
6 on a defendant-by-defendant basis. Defendants are correct in that respect. And they are also  
7 correct that the pleading of fraudulent concealment is not governed solely by FRCP Rule 8, but  
8 also by the stricter pleading requirements of RCP Rule 9(b). And defendants have cited some  
9 decisions in this circuit or district that have used the word "each" with respect to the required  
10 pleading of fraudulent concealment. But those decisions have not been in the context of a large  
11 international conspiracy as is this case. The requirement of individualized pleading must be  
12 tempered by the circumstances, so as not to divert the rule away from its principle and make it  
13 into a writing exercise.

14 It is one thing to compel the plaintiffs to plead that each defendant is a part of the  
15 conspiracy. It is another to require the plaintiffs to plead facts as to what each defendant did  
16 within the conspiracy, including concealment. And indeed, such a requirement would be contrary  
17 to a general principle of conspiracy law that once a party becomes a member of a conspiracy he  
18 is bound by all of the acts of the other conspirators. We must also not lose sight of the fact that  
19 the complaints contain many well pleaded allegations, against numerous of the named  
20 defendants, of their participation in the conspiracy. And application of the pleading requirements  
21 for fraudulent concealment must recognize that by their very nature the acts of fraudulent  
22 concealment would not be readily apparent to even a diligent investigation by plaintiffs, and  
23 particularly not in the details of which defendants did what in order to conceal.  
24  
25  
26  
27  
28



1 The Special Master is of the opinion that the requirement of “each defendant” pleading in  
2 a fraudulent concealment context must be tempered by the realities of the particular case, in these  
3 cases the very extensive pleadings regarding the activities of the defendants in the complaints as  
4 a whole.

5  
6 B. The Direct Case

7 With these guides in mind, the Special Master believes that plaintiffs’ allegations of  
8 fraudulent concealment in the direct case are adequate. Plaintiffs have alleged that the acts of the  
9 defendants were wrongfully concealed and carried out in a matter that precluded detection.  
10 Paragraphs 137, 138, 148, 153, 154, 195, 200-212. The allegations contain references to certain  
11 of the individual defendants (albeit not all) participating in the fraudulent concealment (e.g.  
12 paragraphs 209 and 210). And numerous other portions of the complaint allege the activities of  
13 the conspiracy and its participants.  
14

15 Defendants cite to allegations in the complaint that the structure of the industry was  
16 conducive to a possible conspiracy, as being an indication that plaintiffs were “on notice” and  
17 did not exercise reasonable diligence. However, what plaintiffs must be aware of is not just the  
18 structure of their industry, but of some facts or at least indications that there was actually  
19 anticompetitive conduct going on. And the portions of the complaints cited by defendants do not  
20 really indicate whether the acts were known at the time, or did not become known until after  
21 plaintiffs became aware of the alleged conspiracy in 2007.  
22  
23  
24

25 C. The Indirect Case

26 To the extent that the indirect plaintiffs also allege a Sherman Act violation, the above  
27 discussions regarding the statute of limitation and tolling are applicable. However, as to  
28



1 plaintiffs' allegations of violations of state law, the periods of limitation are defined by each  
2 state's statute, and are primarily measured back from the date that a defendant was first named in  
3 a complaint. The state statutes alleged in the indirect complaint have varying lengths --- three  
4 years, four years and six years. All of those twenty two state statutes are cited on page 42 of  
5 defendants' motion. And defendants assert that the first indirect complaint was filed on  
6 November 13, 2007.  
7

8 Without attempting to define just what claims defendants want dismissed under the state  
9 statutes (other than "all"), both sides to these motions again focus on the sufficiency of the  
10 tolling allegations. That is again the issue of the pleading fraudulent concealment.  
11

12 Defendants argue that plaintiffs must meet the standard of each state for the pleading of  
13 fraudulent concealment as to that state statute. That is essentially correct. But both sides argue  
14 the issues of fraudulent concealment in a more general manner. Defendants argue (pg 43 of the  
15 motion) essentially similar pleading standards as discussed above in the direct case.  
16

17 The tolling allegations of the indirect complaint are contained in paragraphs 288-291,  
18 including the numerous subsections of paragraph 290. Defendants argue that those are  
19 insufficiently general allegations. But those sections specifically allege additional acts by the  
20 conspirators to hide their activities (albeit not naming each defendant). Particularly as alleged in  
21 paragraph 290, the defendants agreed: not to discuss their activities in public, or the nature or  
22 substance of their communications; to expel anyone who might do so; to limit the number of  
23 representatives attending the meetings; to refrain from listing individual representatives; to  
24 refrain from taking minutes of the meetings, or any kind of written notes; to give false or  
25 pretextual reasons for their price changes; to describe price changes falsely as being the result of  
26 external costs; to agree among themselves on what to tell their customers; to delegate which  
27  
28

1 defendant would talk to which customers; to quote some higher prices to certain customers; to  
2 agree on public statements regarding capacity and supply; and to edit their expense reports which  
3 might reveal the existence of their meetings. The activities of the defendants in participating in  
4 the conspiracies are identified in paragraphs 164 through 188.

5 Paragraph 289 specifically alleges the lack of discovery and the exercise of due diligence.

6 As did the defendants in the direct motion, the indirect defendants also refer to  
7 allegations of certain information which was publically available, in order to argue plaintiffs'  
8 lack of due diligence and constructive knowledge. However, arguments about observable  
9 conduct of the marketplace do not as a matter of law supply the necessary awareness that there  
10 was an actual agreement by the defendants to fix prices and supply; Conmar 858 F. 2d at 504.  
11 While the marketplace may have been openly susceptible to such conduct, the discovery and due  
12 diligence with which we must be concerned here is information that defendants actually engaged  
13 in conspiratorial conduct. And lack of due diligence and constructive knowledge are factual  
14 issues not appropriate for a motion to dismiss; TFT-CLD I, at p. 1120.  
15

16 Viewing the complaints as a whole and under the legal standards discussed above, there  
17 is adequate allegation of fraudulent concealment. The Special Master therefore recommends that  
18 the defendants' motions to dismiss both the direct and indirect complaints on grounds of the  
19 statutes of limitation, and challenging the sufficiency of the fraudulent concealment allegations,  
20 be denied.  
21  
22  
23  
24

## 25 WITHDRAWAL

26 Several defendants seek dismissal on the grounds they withdrew from the alleged  
27 conspiracy in 2001 or 2002, by virtue of their sale or transfer of certain businesses or product  
28

1 lines to other companies. These are alleged to have occurred before the presumed limitations  
2 period in 2003. They are: Phillips, Toshiba, Hitachi, and LGE. Their motions are made in both  
3 the direct and the indirect cases.

4 It is clear that the withdrawal from a conspiracy is an affirmative defense, with the  
5 burden of proof being on the claimed withdrawing party. United States vs. Lothian, 976 F. 2d  
6 1257 (9<sup>th</sup> Cir. 1992). And the question of whether there was withdrawal, and if so when and to  
7 what extent, is a factual issue which is not readily susceptible to resolution by motion.  
8

9 These defendants move to dismiss based upon allegations in the complaints that the  
10 defendants sold or transferred businesses or product lines to other parties on dates preceding  
11 2003. However, the sale of an operating business does not automatically establish the defense.  
12 There must be factual inquiries---again, with the burden of proof on the defendants---into such  
13 subjects as the defendants' continued financial interest in the business that was sold, some  
14 continued participation, or some continued benefit from the alleged conspiracy.  
15

16 And even if a defendant establishes its withdrawal, it is not a free pass from all liability.  
17 The defendant could still be liable for the damages caused by sales made prior to its withdrawal.  
18 Morton's Market Inc., vs. Gustafson's Dairy Inc., 211 F. 3d 1224 (11<sup>th</sup> Cir. 2000). That holding  
19 has been cited in this district; In re: Rubber Chemicals, at p. 790.  
20

21 In addition to the above legal points, some comments on the positions of the defendants  
22 are relevant:  
23

24 The Phillips defendants claim that they exited "the tube business" in 2001 when they  
25 combined forces with another defendant to form a joint venture. "The tube business" obviously  
26 means just the CRTs themselves. However as discussed above, the alleged conspiracy also  
27 pertains to CRT Products and not just tubes. And even if the focus were solely on tubes, upon  
28

1 disposition of its tube line, Phillips participated as a co-owner of a joint venture called LGPD.  
2 That raises factual questions as to whether the sale of the tube business was actually a  
3 withdrawal. The Phillips defendants also argue that after divestiture of its tube business, and  
4 continuing in the product business, they became victims of the conspiracy because they were  
5 paying higher prices for the tubes. However, that argument again ignores the allegations that the  
6 Phillips defendants were part of the conspiracy to also fix prices of CRT Products.  
7

8 The Toshiba defendants argue that they withdrew from the conspiracy in 2002 when they  
9 formed a joint venture with Matsushita Electronics. Even assuming Toshiba's claim is correct,  
10 there is still a factual issue as to whether that was a withdrawal by Toshiba, or Toshiba was still  
11 getting financial benefits. And it could still be liable for the consequences of its acts prior to  
12 2002, unless it can establish that the statute of limitations has run.  
13

14 Hitachi argues that it withdrew from the conspiracy in 2002 when it spun off its  
15 departments related to the display business to "Hitachi Displays." But again, there is a factual  
16 issue of what benefits Hitachi might have from Hitachi Displays with respect to matters that  
17 were the subject matter of the conspiracy, particularly since this is a spin-off to an apparently  
18 related company.  
19

20 LGEI alleges that it exited the CRT business in 2001. But the direct complaint alleges  
21 that during the class period, LGEI manufactured and sold CRT Products throughout the United  
22 States. During the oral argument of the motions, LGEI presented to the Special Master a chart  
23 showing the relationships and transactions among the various LG Entities. However, the Special  
24 Master cannot consider such evidence because it was outside the face of the complaint. The face  
25 of the complaint does not establish that as a matter of law there was a withdrawal or a cessation  
26 of business by LGE.  
27  
28

1 Separately, defendant BMCC argues that the statute of limitations has expired because  
2 the last meeting in which it is alleged to have participated was in 2001. Plaintiffs say in response  
3 that the year “2001” was typographical error in the complaint, and that the correct date should be  
4 “2007,” which would obviously be within the statute of limitations. Plaintiffs’ counsel has  
5 presented a separate affidavit on the claimed error. The Special Master recommends that  
6 plaintiffs be allowed to amend the complaint to correct the alleged typographical error and allege  
7 that the meetings were as late as 2007.  
8

9 Withdrawal may be a valid defense to some allegations and some defendants. And the  
10 Special Master is making no finding with respect to whether the defendants can prove  
11 withdrawal. However, for purposes of this motion to dismiss, which must be decided on the  
12 allegations of the complaint, dismissal in whole or in part is not legally justified because of the  
13 existence of factual questions on which defendants bear the burden of proof.  
14

15 The Special Master therefore recommends that the motions of the above named parties  
16 for dismissal on the grounds of withdrawal from the conspiracy be denied.  
17

#### 18 STATE LAW CLAIMS IN THE INDIRECT CASE 19

20 Defendants’ motions against the indirect complaint make particularized arguments  
21 against some allegations under state law. However, many of the grounds for defendants’ motions  
22 have been discussed above and need not be repeated here<sup>3</sup>. Therefore, it is appropriate to  
23 summarize what the indirect complaint alleges, as found above by the Special Master, before  
24 addressing the separate state law arguments: The complaint alleges CRT Products, as well as  
25  
26

---

27 <sup>3</sup> E.g. CRTs vs. CRT Products, Twombly, “each defendant,” the Foreign Trade Antitrust Improvements Act,  
28 standing under AGC, the federal statute of limitations, and fraudulent concealment.

1 CRTs. Plaintiffs made purchases of those products in the United States, allegedly at non-  
2 competitive prices. A conspiracy to fix the prices and the supply of CRT Products is alleged.  
3 And plaintiffs adequately allege antitrust injury; that is, the payment of higher prices as a result  
4 of the conspiracy. Plaintiffs' claimed injuries are direct and not remote.

5 In addition, there is no legal or pleading impediment to plaintiffs' tracing their claims of  
6 purchases, and apportioning their damages if necessary. Possible future difficulties of proof or  
7 apportionment do not trump the pleading standard that is applicable here; that is, adequate notice  
8 under FRCP Rule 8.

9  
10 The indirect complaint alleges that in addition to the Sherman Act, defendants' conduct  
11 violated the laws of several states. They include state antitrust statutes, consumer protection and  
12 unfair competition statutes, and claims of unjust enrichment and for the disgorgement of profits  
13 under state common law. It is therefore necessary to consider the laws of each state separately, or  
14 as a small group where the laws are substantially the same.

15  
16 A. Defendants move to dismiss the allegations under the laws of Nevada, Hawaii and  
17 Nebraska insofar as the allegations are based upon conduct before those states enacted their so-  
18 called "repealer" statutes, which had the effect of opening the courts to antitrust suits by indirect  
19 purchasers.

- 20  
21 1. Nebraska. Nebraska's repealer statute was effective July 20, 2002. Nebraska requires its  
22 courts to apply statutes prospectively only, absent a clear statement from the Nebraska  
23 legislature to the contrary. Soukop vs. Con Agra, Inc., 653 NW 2d 655 (Neb 2002). The  
24 Special Master finds nothing in the legislative history or in Nebraska's reported cases to  
25 establish a legislative intent that Nebraska's repealer statute be applied retroactively. The  
26  
27  
28



1 Special Master therefore recommends that all alleged Nebraska claims prior to the date of  
2 Nebraska's repealer statute, July 20, 2002, be dismissed.

- 3 2. Nevada. Nevada passed its "Illinois Brick repealer" in 1999. The law of Nevada is that  
4 statutes are prospective only, unless it "clearly, strongly and imperatively appears from  
5 the act itself that the legislature intended the statute to be retrospective in its operation."  
6 Estate of Thomas, 998 P. 2d 560 (Nev 2000). The Nevada statute does not indicate any  
7 retrospective intent. The Special Master therefore recommends that plaintiffs' claims  
8 under Nevada law resulting from actions prior to the 1999 date of the repealer statute, be  
9 dismissed.  
10  
11 3. Hawaii. Plaintiffs have withdrawn their claims based on the law of Hawaii.

12  
13 B. Defendants challenge plaintiffs' claims under the consumer protections statutes  
14 of Massachusetts, New York, and Rhode Island.

- 15 1. Massachusetts. Defendants move to dismiss the claims under the Massachusetts'  
16 Consumer Protection Act, because plaintiffs have not alleged that they made a "written  
17 demand for relief" 30 days before filing their complaint. The complaint does not allege a  
18 written demand. However, plaintiffs argue that the Massachusetts act does not require  
19 such a written demand, "if the prospective respondent does not maintain a place of  
20 business or does not keep assets within the Commonwealth." The complaint does contain  
21 allegations by the Massachusetts plaintiff of activities in which defendants engaged in  
22 that state. A reasonable inference from those activities is that defendants did maintain a  
23 place of business and/or keep assets within Massachusetts. But the burden of pleading  
24 here is upon plaintiffs. And plaintiffs' complaint does not clearly allege or deny a place  
25 of business or the keeping of assets in the state. And plaintiffs have not alleged the giving  
26  
27  
28

1 of the required demand. The Special Master therefore recommends that the motion to  
2 dismiss based upon the Massachusetts Consumer Protection Act be granted, with leave to  
3 amend if plaintiff can truthfully plead that the demand was given or was not necessary.

4 2. New York. Plaintiffs' claim is under New York General Business Law Section 349.

5 Defendants contend that plaintiffs have not adequately alleged the various elements for a  
6 cause of action under that statute. Specifically, defendants challenge the adequacy of the  
7 allegations of deceptive conduct, specific acts, representations or omissions, or conduct  
8 directed toward the New York plaintiffs. The amended complaint does make many  
9 allegations of conduct by defendants, some directed to the State of New York. Plaintiffs'  
10 allegations need not be parsed out, and the sufficiency of each one examined separately.  
11 Suffice it to say that decisions of this district have upheld claims under New York Law  
12 by plaintiffs alleging similar activities by defendants with economic consequences to the  
13 plaintiffs. TFT-LCD I, at pp 1127-28; and GPU I, at p. 1030. The Special Master  
14 recommends that the motions to dismiss the New York law claims be denied.

15 3. Rhode Island. Defendants argue that Rhode Island's Unfair Trade Practices and  
16 Consumer Protection Act does not allow a cause of action for the matters alleged here.  
17 That statute enumerates 19 specific practices that constitute unfair methods of  
18 competition and unfair or deceptive acts or practices. Price fixing, the basis for this case,  
19 is not one of them. Rhode Island indeed has its own separate antitrust statute, but that  
20 statute that does not permit claims by indirect purchasers. Siena vs. Microsoft, 796 A 2d  
21 461 (R.I. 2002). And the courts of Rhode Island appear to have decided that the UTPCPA  
22 benefits only consumers and not businesses. ERI Max Entertainment Inc. vs. Streisand,  
23 690 A. 2d 1351 (RI 997). The Special Master must conclude that a conspiracy to fix  
24  
25  
26  
27  
28



1 prices can be redressed only under Rhode Island's antitrust statute, and not under its  
2 UTPCPA. Two courts in this district have recently dismissed claims under the Rhode  
3 Island UTPCPA, although not necessarily for the same reasons. See DRAM Antitrust  
4 Litigation, 546 F. 3d 981 (9<sup>th</sup> Cir 2008) and TFT-LCD I, at p. 1130. The Special Master  
5 therefore recommends that the alleged causes of action under the Rhode Island statute be  
6 dismissed.  
7

8 4. Hawaii: The claim under Hawaii's consumer protection law has been withdrawn.

9 C. Defendants move to dismiss the unjust enrichment claims under the common law of three  
10 states.

11 1. Michigan: Defendants argue that a Michigan court has held that indirect purchasers  
12 who are allegedly overcharged as a result of anticompetitive conduct do not have  
13 standing to sue for unjust enrichment if they cannot allege that they conferred a  
14 benefit directly upon the defendant. A&M Supply Company vs. Microsoft,  
15 2008WL540883 (Mich. 2008). Plaintiffs contend that such a direct benefit is not  
16 required. The Special Master believes that this district's interpretation of the  
17 applicable Michigan law is correct, and that the unjust enrichment allegations based  
18 upon Michigan law are adequate; TFT-LCD II, at pp 1189-90.  
19

20  
21 D. Kansas. Defendants contend that Kansas common law requires that a plaintiff deal  
22 directly with a defendant in order to state a cause of action for unjust enrichment.  
23 Babcock vs. Carothers Construction, 124 P 3d, 1084; 2005 WL 3527117 (Kans.  
24 2005). From a review of the cases, the Special Master agrees that privity or the direct  
25 conferral of a benefit on the defendant is a requirement for such a claim. Accordingly,  
26  
27  
28

1 the Special Master recommends that the unjust enrichment claims based upon Kansas  
2 law be dismissed.

3 E. New York. Defendants also argue that New York common law requires a direct  
4 benefit between the parties for a claim of unjust enrichment. However, the Special  
5 Master does not interpret New York Law as being that restrictive. The test appears to  
6 be whether the connection between the parties is or is not “too attenuated to support  
7 such a claim.” In this case, plaintiffs are alleging a price fixing conspiracy with  
8 respect to CRT Products, for which plaintiffs paid higher prices. The allegation is of a  
9 conspiracy which was directed at plaintiffs. The Special Master believes that this  
10 allegation is enough to meet the requirements of New York common law and  
11 recommends that the common law allegations of unjust enrichment law not be  
12 dismissed.  
13  
14

15 Finally, defendants argue for a sweeping dismissal of the unjust enrichment claims in  
16 numerous states which have antitrust or consumer protection statutes that limit antitrust actions  
17 or limit recoverable damages. While those contentions may be valid as a general principle,  
18 defendants do not discuss the applicable laws of each state to explain what remedies may or may  
19 not be available under its statutory scheme or its common law, as was done above regarding  
20 Rhode Island. There can be numerous questions of the intent of the state legislatures or the  
21 decisions of the state courts. Defendants have cited to the laws of numerous states, but they have  
22 not carried their burden to establish that the intent of the legislature in enacting a specific statute,  
23 or a decision of a particular state court, precludes relief for restitution or unjust enrichment.  
24 Defendants’ arguments may be valid, but they have yet to be demonstrated to the point of  
25  
26  
27  
28

1 justifying such broad dismissals. The Special Master therefore recommends that defendants'  
2 motion on that ground be denied without prejudice.

### 3 SUMMARY OF RECOMMENDATIONS

4 For the reasons discussed above the Special Master makes the above tentative rulings,  
5 and recommends that the District Court:

- 6 1. Find that the relevant products alleged in the complaints are CRTs and CRT Products.
- 7 2. Deny defendants' motions to dismiss based upon Twombly and Iqbal.
- 8 3. Deny defendants' motions to dismiss based upon an alleged failure to adequately plead
- 9 against "each defendant."
- 10 4. Deny defendants' motions to dismiss based upon the Foreign Trade Antitrust
- 11 Improvements Act, the Supremacy Clause and the Commerce Clause.
- 12 5. Deny defendants' motions to dismiss based upon plaintiffs' alleged lack of standing.
- 13 6. Find that the allegations of the direct and indirect complaints regarding fraudulent
- 14 concealment are adequate to toll the statutes of limitation.
- 15 7. Deny defendants' motions to dismiss both the direct and indirect complaints on the
- 16 grounds of the statutes of limitation.
- 17 8. Grant plaintiffs' motion to amend the face of the direct complaint, with respect to the
- 18 allegations against BMCC to change the year "2001" to "2007."
- 19 9. Deny the motions of several defendants for dismissal based upon their alleged withdrawal
- 20 from the conspiracy.
- 21 10. Dismiss the claims under Nebraska law based on sales made prior to July 20, 2002.
- 22 11. Dismiss the claims under Nevada law based on sales made prior to the 1999 date of
- 23 Nevada's repealer statute.
- 24 12. Dismiss plaintiffs' claims under the Massachusetts Consumer Protection Act, with leave
- 25 to amend.
- 26 13. Deny the motions to dismiss plaintiffs' claims under New York General Business Law
- 27 Section 349.
- 28

1 14. Dismiss the allegations under the Rhode Island Unfair Trade Practices and Consumer  
2 Protection Act.

3 15. Deny the motion to dismiss the claims under Michigan common law of unjust  
4 enrichment.

5 16. Dismiss the claims made under Kansas' common law of unjust enrichment.

6 17. Deny defendants' motion to dismiss the claims of unjust enrichment under New York  
7 common law.

8 18. Deny, without prejudice, defendants' motions to dismiss the unjust enrichment claims of  
9 several states based upon other statutes in those states.

10 19. Set a date for the filing of answers.

11 20. Set a date for a case management conference to schedule further proceedings in the case,  
12 or direct the Special Master to do so.

13  
14 Respectfully Submitted,

15  
16 Dated: February 5, 2010

  
Hon. Charles A. Legge (Ret.)  
SPECIAL MASTER

## Appendix A.

1  
2 Beijing Matsushita Color CRT Company, Ltd.; Hitachi, Ltd.; Hitachi Asia, Ltd.; Hitachi  
3 America, Ltd.; Hitachi Electronic Devices (USA), Inc.; Hitachi Displays, Ltd.; Irico Group  
4 Corporation; Irico Display Devices Co., Ltd.; LG Electronics, Inc.; LG Electronics USA, Inc.;  
5 LG Electronics Taiwan Taipei Co., Ltd; MT Picture Display Co., Ltd.; Panasonic Corporation of  
6 North America; Panasonic Corporation; Philips Electronics North America Corporation;  
7 Koninkiljke Philips Electronics N.V.; Philips da Amazonia Industria Electronica Ltda.; Samsung  
8 SDI America, Inc.; Samsung SDI Co., Ltd.; Samsung SDI (Malaysia) Sdn. Bhd.; Samsung SDI  
9 Mexico S.A. de C.V.; Samsung SDI Brasil Ltda.; Shenzhen Samsung SDI Co. Ltd.; Tianjin  
10 Samsung SDI Co., Ltd.; Samsung Electronics Co., Ltd.; Samsung Electronics America Inc.;  
11 Samtel Color, Ltd.; Toshiba Corporation; Toshiba America Electronic Components, Inc.;  
12 Toshiba America Information Systems, Inc.; Toshiba America, Inc.; and Toshiba America  
13 Consumer Products L.L.C..  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## Appendix B.

1  
2 Beijing Matsushita Color CRT Company, Ltd.; Hitachi, Ltd.; Hitachi Asia, Ltd.; Hitachi  
3 America, Ltd.; Hitachi Electronic Devices (USA), Inc.; Hitachi Displays Ltd.; Irico Display  
4 Devices Co., Ltd.; Irico Group Corporation; LG Electronics, Inc.; LG Electronics USA, Inc.; LG  
5 Electronics Taiwan Taipei Co., Ltd.; MT Picture Display Co., Ltd.; Panasonic Corporation of  
6 North America; Panasonic Corporation; Philips Electronics North America Corporation;  
7 Koninkiljke Philips Electronics N.V.; Philips da Amazonia Industria Electronica Ltda.; Samsung  
8 SDI America, Inc.; Samsung SDI Co., Ltd.; Samsung SDI (Malaysia) Sdn. Bhd.; Samsung SDI  
9 Mexico S.A. de C.V.; Samsung SDI Brasil Ltda.; Shenzhen Samsung SDI Co. Ltd.; Tianjin  
10 Samsung SDI Co., LTD.; Samsung Electronics Co., Ltd.; Samsung Electronics America, Inc.;  
11 Samtel Color, Ltd.; Toshiba Corporation; Toshiba America Electronic Components, Inc.;  
12 Toshiba America Information Systems, Inc.; Toshiba America, Inc.; and Toshiba America  
13 Consumer Products L.L.C..  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28